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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,
vs.
W. T. GRANT COMPANY, S. H. KRESS AND COMPANY AND JOHN M. HANCOCK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF APPELLEES JOHN M. HANCOCK, ET AL., OPPOSING JURISDICTION AND MOTION TO AFFIRM.

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HOWARD T. MILMAN,
Counsel for Appellees John M. Hancock, Sears, Roebuck and Company, Bond Stores, Incorporated and Jewel Tea Company, Incorporated.

SULLIVAN AND CROMWELL,
Of Counsel.

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APPELLEES' OPPOSING STATEMENT AND MOTION TO AFFIRM

Appellees John M. Hancock, Sears, Roebuck and Company, Bond Stores Incorporated and Jewel Tea Company, Inc., pursuant to Rule 7, paragraph 3 and Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States, move that the final judgments and decrees of the District Court be affirmed.

Statement

The Government has appealed under the Expediting Act, 15 U. S. C. § 28 (1946 ed.), 15 U. S. C. § 29 (1946 ed. Supp. V), from judgments entered in the United States District Court for the Southern District of New York (Conger, J.) dismissing as moot its complaint in three actions.

In each of the three actions, the Government has charged that appellee John M. Hancock is or has been a director of two corporate appellees, each of which has capital, surplus and undivided profits aggregating more than $1,000,000. The Government complains that Mr. Hancock's directorships are in violation of Section 8 of the Clayton Act, 15 U. S. C. § 19 (1946 ed.), in that the corporate appellees are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would be forbidden by the anti-trust laws. The complaints seek broad injunctive relief. In each case, the appellees moved that the complaint be dismissed for mootness as well as on other grounds.

The District Court, treating the motions as motions for summary judgment, dismissed the complaints, stating:

> "I do not think there is the slightest threat that the defendants will attempt any future activity in violation of Section 8 [if they have violated it already] . . ."

The Judgment Should Be Affirmed Because No Substantial Question Is Involved

I

The Law Is Unquestioned

There is no question as to the applicable law in this case. We agree with the statement of the law as set forth at page 9 of the Government's statement as to jurisdiction, namely

that mere discontinuance of an illegal practice after the Government has filed to enjoin does not of itself render the case moot, but that the rule is, as laid down by Chief Judge Learned Hand in *United States* v. *Aluminum Company of America*, 148 Fed. 2d 416, 448:

> "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

II

The Facts

We submit that it is free from doubt that applying this test to the facts in the instant case, it is moot.

The Government alleges at page 10 that Mr. Hancock stated "merely that he had no intention of" not returning to the three boards from which he had retired. It repeats the quotation of the word "intention" twice at page 7, with the apparent purpose of implying that Mr. Hancock was free hereafter to change his "intention" and had not made any irrevocable decision. It then argues, at page 9, that it was an abuse of discretion for the court below to hold that there was "no reasonable expectation that the wrong would be repeated."

The record discloses that the statement of "no intention" of Mr. Hancock was only one of a number of facts supporting the court's decision. They are as follows:

This appeal is from three judgments in three separate cases, each involving two different corporations of which Mr. Hancock was a director.

Civil Action 73-298 involves the directorships of Mr. Hancock in The Kroger Company and Jewel Tea Company, Inc., both of which corporations were named defendants in addition to Mr. Hancock. The complaint was served on February 28, 1952. As appears from the affidavit of Mr. Hancock in this case, Mr. Hancock's directorship in The

Kroger Company was terminated on March 5, 1952. This was the date of the annual meeting of the stockholders of The Kroger Company, at which time Mr. Hancock's term of office expired, and he was not reelected as a director. At the annual meeting the President of The Kroger Company made a statement which appeared in the public press that Mr. Hancock had decided not to stand for reelection because of the suit brought by the Department of Justice, having given as his reason that "he would prefer to avoid the necessity for our company's contesting the suit".

Mr. Hancock's affidavit contains the following statement from which the Government's statement quoted only the first sentence and omitted the remainder:

> "I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. *My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do.*" (Italics supplied.)

Mr. Thomas T. Oyler, General Counsel of The Kroger Company, filed an affidavit in the same action which included the following statements:

> "That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company. • • •
>
> "That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate or propose

said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection."

The second case is Civil Action 73-296, involving the directorships of Mr. Hancock in W. T. Grant Company and S. H. Kress & Company, both of which corporations were named as defendants with Mr. Hancock. This action was commenced on the same day as the first action. As appears from the affidavit of Mr. Hancock filed in this action, Mr. Hancock resigned as director of S. H. Kress & Company on March 11, 1952. There is a similar statement with respect to Mr. Hancock's decision to never go back on the Board of Directors of S. H. Kress & Company as was contained in his affidavit in Civil Action 73-298.

In addition, there is an affidavit in this case by Mr. Orwill V. W. Hawkins, Vice President of S. H. Kress & Company, which included the following statement:

"On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress."

The third action is Civil Action 73-297 involving Sears, Roebuck and Company and Bond Stores, Incorporated, both of which corporations are named as defendants together with Mr. Hancock. This action was commenced on the same date as the two preceding actions. In an affidavit by Mr. Hancock, filed in this action, it is stated that he resigned as a director of Bond Stores, Incorporated on March 14, 1952, and there is a similar statement of his decision never to go back on the Board of Directors of that company to that contained in his affidavit in Civil Action 73-298. In addition, there is an affidavit in this action by

Mr. Irving Cohen, Vice President of Bond Stores, Incorporated, which includes the following statement:

> "On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot."

We submit that these facts in the record establish beyond any possibility of doubt that the test laid down in *United States* v. *Aluminum Company of America*, that there is "no reasonable expectation that the wrong will be repeated", has been fully met.

III

There Is No Possibility That Mr. Hancock Will Go Back on the Three Boards from Which He Has Retired

In the only case involving the precise question involved in the instant cases, namely *United States* v. *Mather*, referred to in Footnote 3 on page 6 of the Government's statement, Judge Jones, on December 2, 1935, entered an order granting the motion to dismiss on the ground of mootness as to certain defendants.

Thereafter, on February 11, 1936, the Government moved to dismiss the petition, without prejudice, on the ground that the individual defendants were no longer interlocking directors of the corporate defendants. The purpose of the Government's motion was to make the dismissal one without prejudice, so that the court would retain jurisdiction in the event that the interlocking directorships should in the future be resumed.

The Government's motion to dismiss without prejudice recited the prior dismissal as to some of the defendants, and stated:

"In granting said motions the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, stated in open court on December 2, 1935:

> 'I am certain these parties defendant would not be in any position in this court, have any standing, if they were brought back here again and charged with resuming the relationship, the dissolution of which they have urged as a basis for sustaining the motion.'

and that, in effect such resumption of the relationship charged

> 'would amount to a fraud on the court, because the court in sustaining this motion would have the right to assume that the cessation of the relationship was intended to be of a permanent character and obviate the necessity of the court's hearing the whole case and making a determination which would require the granting of a permanent injunction.'

Since it now appears that said defendants do not intend to resume said interlocking directorships, petitioner does not desire to proceed further by appeal from the order granting said motions."

It is obvious that in the instant cases there is no possibility that a surreptitious attempt would hereafter be made by Mr. Hancock to go back on the Boards of any of the three companies of which he is no longer a director. Mr. Hancock is a widely-known business leader and a partner in the firm of Lehman Brothers, who was a Commander in the United States Navy in World War I and an alternate to Mr. Bernard M. Baruch as United States representative on the United Nations Atomic Energy Committee from 1946 to 1949. Furthermore, the three corporations involved, as well as the other three defendant corporations, are all publicly owned corporations, the shares of which are

listed on the New York Stock Exchange, which are subject to the rules of the Securities and Exchange Commission which require the disclosure, in the annual proxy statements sent to stockholders and filed with the Commission, of the names of all directors. It is inconceivable that in the light of the above facts either Mr. Hancock or any of the three defendant corporations would take any action which, to quote the language of Judge Jones in *United States* v. *Mather*, would "amount to a fraud on the Court".

IV

There Are No Other Existing Directorships of Mr. Hancock Which the Government Claims Violate Section 8

The Government's statement at page 10 makes the further contention that Mr. Hancock

> "made no specific commitment not to serve on the boards of *other competing companies.*" (Italics supplied.)

and following this language is a footnote calling attention to the fact that Poor's 1952 Registry of Directors and Executives lists Mr. Hancock as a director of fourteen companies in addition to the six involved in the instant cases. The implication of this statement appears to be that some of the directorships of some of the other fourteen companies may violate Section 8 of the Clayton Act.

It is submitted that this implication is unjustified.

Mr. Hancock's affidavit in each of the three cases contains the following statement:

> "The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and

I had numerous conferences with the Department of Justice and submitted numerous memoranda of facts and of law to the Department of Justice."

As this statement of Mr. Hancock indicates, *all* the directorships held by Mr. Hancock were known to the Department of Justice, and the applicability of Section 8 of the Clayton Act considered by them, and discussed over a period of five years with Mr. Hancock and his counsel. Finally, as a result of these discussions, the Department of Justice determined that there were three pairs of interlocking directorships existing which violated Section 8, and the Government brought the three instant actions. This is a clear recognition by the Department of Justice that it does not consider any of the other fourteen directorships held by Mr. Hancock as constituting any violation of Section 8 of the Clayton Act.

V

There Is No Other Violation of Section 8 Threatened by Mr. Hancock

There is no suggestion by the Government in its complaint nor is there any reasonable possibility that Mr. Hancock will *hereafter* go on the board of some other company or companies which would involve in the opinion of the Department of Justice a violation of Section 8 of the Clayton Act.

In the first place, as appears from "Who's Who", Mr. Hancock will be seventy years of age on February 2, 1953 and the presumption is he will be contracting rather than expanding his business activities hereafter. In the second place, Mr. Hancock's action in retiring from the boards of the three companies involved in these cases, because he "preferred to avoid the necessity for the company's contesting the suit" indicates the utter unreasonableness of assuming that Mr. Hancock would hereafter go on the

board of another company which would result in the institution of a new action by the Department of Justice, and which would then in turn lead to his resignation.

VI

There Is No Future Violation of Section 8 Threatened by any of the Six Defendant Corporations Involving a Director Other Than Mr. Hancock.

There is no suggestion by the Government in its complaint that any one of the six defendant corporations threatens in the future to elect some new director in violation of Section 8. Nor is there any ground for assuming that any one of the six defendant corporations intends hereafter to elect a new director in violation of Section 8 than there is that any other corporation intends to. The fact that Mr. Hancock's directorship may have violated Section 8 is no basis for assuming a propensity of the defendant corporations to violate Section 8.

On the motion below, the Government had the opportunity to show the existence of a propensity or probability of future violation by the six defendant corporations, in which event it could have been argued that the court should not have dismissed the actions but, if a violation were found to have existed prior to Mr. Hancock's termination of those directorships, the court should instead have granted the injunctive relief demanded. The Government, however, offered no such proof. It offered no evidence whatever to show that an injunction was necessary and in the absence of any such showing, the actions were properly dismissed as moot.*

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* It does not appear from the record or the Government's statement, but the fact is that at the same time that the instant cases were filed, the Government filed an additional action under Section 8 against Sears, Roebuck and Company, The B. F. Goodrich Company, and Sidney J. Weinberg, bringing into question Mr. Weinberg's interlocking directorship in Sears and Goodrich (S.D.N.Y. Civil Action No. 73-292). This case is being defended on the merits.

VII

Other Grounds for Dismissal of Complaint

If the Supreme Court takes jurisdiction of the appeal other questions besides mootness are present.

Judge Conger, in his opinion, stated:

> "These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot."

Among the other grounds upon which the defendants urged the complaints should be dismissed, are the following:

1. Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and the Federal District Court is without jurisdiction to enforce it.

2. If the preceding contention is not sound, and if Section 15 of the Clayton Act does apply, in any event jurisdiction is limited to the individual director and there is no jurisdiction over the corporate defendants because Section 8 provides only that "*no person* * * * shall be a director in any two or more corporations * * *".

None of these additional questions is argued here because they do not arise if—as we submit—the actions were properly dismissed as moot.

VIII

Conclusion

This appeal would bring to this court the question whether the Government is entitled to injunctive relief against Mr. Hancock and the six corporations. We submit that the question is not substantial because the Government can point to nothing in the record on which the court below

could have determined that there was a "reasonable expectation that the wrong will be repeated". There certainly was no abuse of discretion when the discretion appealed from is amply supported by the evidence submitted, and none was offered in opposition.

WHEREFORE, appellees' motion to affirm the judgments and decrees appealed from should be granted on the ground that the appeals present no substantial question requiring immediate decision by this Court.

Respectfully submitted,

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November 12, 1952.